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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

PHYLLIS GARCIA,	)	Case No. CV 08-4840-MLG
	)	
Plaintiff,	)	MEMORANDUM OPINION AND ORDER
	)	
v.	)	
	)	
MICHAEL ASTRUE,	)	
Commissioner of Social	)	
Security,	)	
	)	
	)	
Defendant.	)	
	)	

Plaintiff Phyllis Garcia seeks judicial review of the Commissioner's denial of her application for Disability Insurance benefits ("SSDI") and Supplemental Security Income ("SSI") under the Social Security Act. For the reasons stated below, the action is remanded for further proceedings consistent with this opinion.

**I. Facts and Procedural History**

Plaintiff was born on September 30, 1950, and she has an eleventh grade education. (Joint Stip. 2.) Plaintiff's work history includes positions as a packing supervisor and quality control inspector.

1 (Administrative Record ("AR") 419-20.) Plaintiff has not been gainfully  
2 employed since June 12, 2001, when she fell in a supermarket and injured  
3 her back. Plaintiff's date last insured is December 31, 2006.

4 Plaintiff filed applications for SSDI and SSI on May 2, 2005, and  
5 May 26, 2005, respectively, alleging a disability onset date of June 12,  
6 2001, due to a number of physical and mental impairments. (AR 80, 133.)  
7 The Commissioner denied Plaintiff's claim on February 16, 2006, and  
8 again on January 26, 2007, upon reconsideration. (AR 47-57.) After  
9 Plaintiff's timely request, Administrative Law Judge ("ALJ") Richard A.  
10 Urbin held a hearing on February 5, 2008, at which Plaintiff testified  
11 and was represented by counsel. (Joint Stip. 2.) A vocational expert  
12 also testified at the hearing.

13 Applying the analysis mandated by the Social Security Regulations,<sup>1</sup>  
14 the ALJ concluded that Plaintiff was not disabled and denied her claim  
15 for benefits on February 29, 2008. (AR 17-29.) The ALJ found that  
16 Plaintiff had the following medically determinable impairments<sup>2</sup>:

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18 <sup>1</sup> When determining whether a claimant's impairments and limitations  
19 falls within the meaning of "disability," the ALJ must consider the  
20 following questions: (1) whether the claimant is engaged in substantial  
21 gainful activity; (2) whether the claimant's medically determinable  
22 impairment is "severe" and meets the durational requirement; (3) whether  
23 the impairment meets or equals one of the listings in 20 C.F.R. § 404,  
24 Subpart P, Appendix 1; (4) whether the claimant is able to return to  
25 past relevant work; and (5) whether the claimant can do other types of  
26 work. 20 C.F.R. § 404.1520(a)(4). These steps are cumulative, meaning  
27 that the ALJ need not consider further steps after finding that a step  
28 does not favor the claimant.

<sup>2</sup> To obtain disability benefits under the Social Security Act, a  
claimant must establish "the inability to do any substantial gainful  
activity by reason of any medically determinable physical or mental  
impairment which can be expected to result in death or which has lasted  
or can be expected to last for a continuous period of not less than 12  
months." 20 C.F.R. § 404.1505(a). A medically determinable impairment  
"must result from anatomical, physiological, or psychological  
abnormalities which can be shown by medically acceptable clinical and

1 hypertension, anterolisthesis, spondylosis, degenerative disc disease  
2 and facet joint arthritis of the lumbosacral spine, chronic nicotine  
3 abuse, an adjustment disorder with depression, and anxiety. (AR 20.) The  
4 ALJ determined that Plaintiff also had a number of conditions that were  
5 not medically determinable impairments, including: sinusitis, cardiac  
6 impairment other than hypertension, shingles, anemia, decreased visual  
7 acuity, obesity, dental abscess, torn posterior horn of the medial  
8 meniscus and possible radial tear and extrusion of the medial meniscus  
9 body, left shoulder cyst, bulge in the right triceps, right hand tremor,  
10 hypothyroidism, dizziness, and right shoulder osteoarthritis of the  
11 acromioclavicular joint.<sup>3</sup> (AR 20-22.)

12 The ALJ then concluded that Plaintiff's medically determinable  
13 physical impairments, in combination, were severe under the regulations,  
14 but that Plaintiff's mental impairments were not severe. (AR 23.) The  
15 ALJ determined that Plaintiff's physical or mental impairments did not  
16 meet or equal any listed impairment under 20 C.F.R. § 404, Subpart P,  
17 Appendix 1. (AR 23.)

18 The ALJ found that Plaintiff had the residual functional capacity  
19 ("RFC") to lift and carry twenty pounds occasionally and 10 pounds  
20 frequently, stand, walk, or sit for six hours out of an eight-hour  
21

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22 laboratory diagnostic techniques." *Id.* § 404.1508. If a claimant does  
23 not have a medically determinable impairment, the claimant is not  
24 disabled.

25 <sup>3</sup> For many of these conditions, the ALJ concluded that they were  
26 not medically determinable impairments because they could not be  
27 expected to last for twelve continuous months. The Court notes that the  
28 durational requirement is a separate inquiry from determining whether  
the claimant has a medically determinable impairment. See 20 C.F.R. §§  
404.1508, 404.1509. This is a minor semantic error, however, having no  
impact on either the ALJ's decision or the Court's analysis, so the  
Court need not address it further.

1 workday, and perform simple and complex work. (AR 23.) In reaching the  
2 RFC determination, the ALJ gave no weight to a treating nurse  
3 practitioner's opinion and found that Plaintiff was not credible as to  
4 her subjective symptoms and limitations. (AR 24-27.) The ALJ concluded  
5 that Plaintiff was capable of performing past relevant work and was not  
6 disabled under the Social Security Act. (AR 28.)

7 Plaintiff appealed the ALJ's decision to the Social Security  
8 Administration Appeals Council, providing more recent medical records  
9 that the Appeals Council made part of the record. (AR 7.) The Appeals  
10 Council denied Plaintiff's request for review of the ALJ's decision on  
11 May 30, 2008. (AR 3.) Plaintiff then filed the instant action on August  
12 1, 2008, alleging that the ALJ erred by failing to fully develop the  
13 record and by improperly evaluating Plaintiff's symptoms and  
14 credibility. (Joint Stip. 3.)

## 15 16 **II. Standard of Review**

17 The Court must uphold the Social Security Administration's  
18 disability determination unless it is not supported by substantial  
19 evidence or is based on legal error. *Ryan v. Comm'r of Soc. Sec.*, 528  
20 F.3d 1194, 1198 (9th Cir. 2008)(citing *Stout v. Comm'r of Soc. Sec.*  
21 *Admin.*, 454 F.3d 1050, 1052 (9th Cir. 2006)). Substantial evidence means  
22 more than a scintilla, but less than a preponderance; it is evidence  
23 that a reasonable person might accept as adequate to support a  
24 conclusion. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir.  
25 2007)(citing *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir.  
26 2006)). To determine whether substantial evidence supports a finding,  
27 the reviewing court "must review the administrative record as a whole,  
28 weighing both the evidence that supports and the evidence that detracts

1 from the Commissioner's conclusion." *Reddick v. Chater*, 157 F.3d 715,  
2 720 (9th Cir. 1996). "If the evidence can support either affirming or  
3 reversing the ALJ's conclusion," the reviewing court "may not substitute  
4 [its] judgment for that of the ALJ." *Robbins*, 466 F.3d at 882.

### 5 6 **III. Discussion**

7 Plaintiff argues that the ALJ failed to fully develop the record by  
8 relying on the consulting and state agency physicians' opinions that  
9 were rendered before Plaintiff's condition allegedly worsened. (Joint  
10 Stip. 4.) Plaintiff also contends that the ALJ improperly rejected the  
11 treating nurse practitioner's opinion.

12 Plaintiff appeared for a consultative examination with consulting  
13 physician Rocely Ella-Tamayo, M.D., on January 4, 2007. (AR 299-304.)  
14 Dr. Ella-Tamayo diagnosed Plaintiff with untreated hypertension, back  
15 pain, and chronic nicotine abuse, finding that Plaintiff could push,  
16 pull, lift and carry twenty pounds occasionally and ten pounds  
17 frequently, with no postural limitations, restrictions on sitting, or  
18 functional impairment in either hand. (AR 303.) Dr. Ella-Tamayo further  
19 opined that Plaintiff could stand and walk for six hours out of an  
20 eight-hour day. (*Id.*) On January 25, 2007, a non-examining state agency  
21 physician reached a similar conclusion upon reviewing Plaintiff's  
22 medical records. (AR 276-83.) The ALJ relied on these opinions in  
23 reaching the RFC determination. (AR 27-28.)

24 Plaintiff alleges that her shoulder and knee condition deteriorated  
25 in August 2007. (Joint Stip. 7.) On October 16, 2007, Plaintiff's doctor  
26 gave her a knee immobilizer, then an elastic knee brace on November 1,  
27 2007. (AR 246-47.) On November 8, 2007, Plaintiff received a base quad  
28 cane. (AR 245.) On January 15, 2008, Plaintiff's doctor issued a lumbar

1 support brace. (AR 244.)

2 A January 22, 2008, MRI of Plaintiff's left knee revealed a  
3 longitudinal horizontal tear of the posterior horn and body of the  
4 medial meniscus with a possible complicating radial tear at the  
5 posterior horn with extrusion of the medial meniscal body causing  
6 moderate bowing of the MCL; near full-thickness chondral thinning at the  
7 medial aspect of the medial femorotibial compartment in the region of  
8 the extruded medial meniscus with mild reactive marrow edema in the  
9 medial tibial plateau; mild chondral thinning at the patellofemoral  
10 compartment involving the superior portion of the patellar apex and  
11 medial facet with no full thickness chondral defect; mild joint  
12 effusion; moderate popliteal cyst that appeared to be leaking; and mild  
13 nonspecific edema in the prepatellar subcutaneous soft tissues. (AR 258,  
14 261.)

15 An MRI of Plaintiff's right shoulder on the same date showed  
16 moderate tendinosis of the supraspinatus tendon with fluid signal  
17 through the anterior fibers of the supraspinatus tendon, possibly  
18 indicating a small focal full-thickness perforation; mild subscapularis  
19 tendinosis with no focal tear; thickening and irregularity of the long  
20 head of the biceps tendon within the bicipital groove suggesting  
21 tendinosis with nonvisualization of the long head of the biceps tendon  
22 at the intracapsular portion indicating possible full-thickness tear;  
23 large joint effusion; moderate fluid collection in the subacromial  
24 subdeltoid bursa; mild glenohumeral osteoarthritis with small marginal  
25 osteophyte formation; acromioclavicular osteoarthritis with inferiorly  
26 projecting osteophyte formation and minimal impression on the  
27 supraspinatus myotendinous junction; mild heterogeneous signal in the  
28 superior glenoid labrum, possibly indicating degenerative changes in the

1 labrum. (AR 260, 259.)

2 A February 13, 2008, MRI of Plaintiff's lumbar spine showed small  
3 disc bulges not resulting in significant spinal stenosis at L2-3, L4-5,  
4 and L5-S1; grade 1 anterolisthesis L4 on L5 and L5 on S1; degenerative  
5 changes including mild bulging of uncovered disc mildly narrowing the  
6 spinal canal, though not resulting in significant central canal  
7 stenosis; facet hypertrophy mildly encroaching upon the lateral recess,  
8 right greater than left; mild to moderate right and mild left foraminal  
9 narrowing; and significant changes in disc space suggesting degenerative  
10 gas formation. (AR 408-09.) On February 26, 2008, Plaintiff's doctor  
11 prescribed a walker with a seat. (AR 413-14.)

12 On January 31, 2008, Plaintiff's treating nurse practitioner,  
13 Juanita Harper, completed a medical assessment, noting that Plaintiff  
14 suffered from several conditions including a possible torn medial  
15 meniscus in her left knee, and opined that Plaintiff had "poor prognosis  
16 for re-entering the workforce." (AR 254-57.) Plaintiff was referred for  
17 surgery for her left knee and left shoulder. Plaintiff had a cyst in  
18 her shoulder removed on March 18, 2008, though she still reported  
19 significant shoulder pain on April 9, 2008. (AR 382-83, 387.) Plaintiff  
20 was approved for knee surgery on April 16, 2008, which is where the  
21 medical records end. (Joint Stip. 7.)

22 With no discussion whatsoever, the ALJ concluded that Plaintiff's  
23 left knee impairment, left shoulder cyst, and right shoulder impairment  
24 would not persist for twelve consecutive months (AR 22), as necessary  
25 for a finding of disability. 42 U.S.C. § 1382c(a)(3)(A). The Social  
26 Security Regulations require the ALJ to provide a more detailed  
27 analysis, however:

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1 All cases denied on the basis of insufficient duration must  
2 state clearly in the denial rationale that either:

3 Within 12 months of onset, there was or is expected  
4 to be sufficient restoration of function so that  
5 there is or will be no significant limitation of  
6 the ability to perform basic work-related  
7 functions....; or

8 Within 12 months of onset, there was or is expected  
9 to be sufficient restoration of function so that in  
10 spite of significant remaining limitations the  
11 individual should be able to do past relevant work  
12 or otherwise engage in [substantial gainful  
13 activities], considering pertinent vocational  
14 factors.

15 In the latter case, a thorough documentation, evaluation, and  
16 rationalization of the claimant's RFC, work history, and  
17 vocational potential will be necessary.

18 SSR 82-52, 1982 WL 31376 (S.S.A. 1982). The ALJ's conclusory statements  
19 that Plaintiff's knee and shoulder impairments did not meet the  
20 durational requirement are insufficient.

21 Moreover, the medical records provide no support for the ALJ's  
22 conclusion. The only notation in the record even indirectly addressing  
23 the expected duration of Plaintiff's impairments is the nurse  
24 practitioner's assessment that Plaintiff had a "poor prognosis for  
25 returning to the workforce." (AR 254.) The ALJ rejected Harper's opinion  
26 because she is not a physician, no evidence shows a physician approved  
27 her opinion, and "her opinion relies in part on impairment of the left  
28 knee and right shoulder ... that I anticipate will not persist for 12



1 consecutive months. (AR 27.) In other words, the ALJ rejected what  
2 appears to be the only opinion in the record touching on the durational  
3 aspect of Plaintiff's impairments, because he had already determined  
4 that those impairments did not meet the durational requirement. Aside  
5 from the fact that the ALJ cannot summarily reject a treating nurse's  
6 opinion simply because she is not a physician, 20 C.F.R. §  
7 404.1513(d)(1); SSR 06-03p, 2006 WL 2329939 (S.S.A. Aug. 9, 2006), the  
8 ALJ failed to provide sufficient explanation for his belief that  
9 Plaintiff's shoulder and knee impairments would resolve within twelve  
10 months.

11 The existence of ambiguous evidence, or inconclusive or otherwise  
12 inadequate medical records triggers an ALJ's duty to seek clarification  
13 or additional evidence from medical sources. *Mayes v. Massanari*, 276  
14 F.3d 453, 459 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d 1144, 1150  
15 (9th Cir. 2001). The ALJ must "investigate the facts and develop the  
16 arguments both for and against granting benefits...." *Sims v. Apfel*, 530  
17 U.S. 103, 110-11 (2000) (*cited by Reed v. Massanari*, 270 F.3d 838, 841  
18 (9th Cir. 2000)). The ALJ's duty to fully and fairly develop the record  
19 exists even when the claimant is represented by counsel. *Smolen v.*  
20 *Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996).

21 Here, the ALJ concluded without discussion that several of  
22 Plaintiff's impairments did not meet the durational requirement, then  
23 summarily rejected the only evidence that might have shed light on the  
24 extent of Plaintiff's limitations. The ALJ erred. Remand is appropriate  
25 to ascertain the expected duration of Plaintiff's knee and shoulder  
26 impairments, and to consider whether those impairments have an impact on

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1 the RFC determination.<sup>4</sup> The Court need not address Plaintiff's other  
2 assignments of error.

3  
4 **V. Conclusion**

5 For the reasons stated above, it is **ORDERED** that the case be  
6 remanded to the ALJ for proceedings consistent with this opinion. The  
7 Commissioner's request for an order affirming the Commissioner's final  
8 decision and dismissing the action is **DENIED**.

9  
10 DATED: May 15, 2009



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13 MARC L. GOLDMAN  
14 United States Magistrate Judge  
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24 <sup>4</sup> Defendant also argues that Plaintiff should have filed a new  
25 application when her condition worsened, citing *Sanchez v. Sec'y of*  
26 *Health & Human Serv.*, 812 F2d 509, 512 (9th Cir. 1987). (Joint stip.  
27 17.) *Sanchez* provides a framework for determining whether medical  
28 evidence submitted after the Commissioner's final decision should reopen  
the case. Plaintiff raised her worsened condition even before the  
hearing, and well before the Commissioner submitted a final decision on  
Plaintiff's claim. *Sanchez* is inapposite and Defendant's argument is  
without merit.